No. 76-1660

In the Supreme Court of the United States

OCTOBER TERM, 1977

TERRELL DON HUTTO, ET AL., PETITIONERS

v.

ROBERT FINNEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.,
Solicitor General,
DREW S. DAYS, III,
Assistant Attorney General,
WALTER W. BARNETT,
DENNIS J. DIMSEY,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether the Civil Rights Attorney's Fees Awards Act of 1976 authorizes an award of attorney's fees to be paid from the funds of a state department of correction.

2. Whether the Civil Rights Attorney's Fees Awards Act applies to cases pending on the date of its enactment.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Eleventh Amendment to the United States Constitution provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94–559, 90 Stat. 2641, provides as follows:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92–318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. 1979, 42 U.S.C. 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

> immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

INTEREST OF THE UNITED STATES

The Attorney General has responsibility for enforcement of a variety of federal civil rights laws, including those requiring nondiscrimination in voting (42 U.S.C. 1971 *et seq.*), public accommodations (42 U.S.C. 2000a *et seq.*), public facilities (42 U.S.C. 2000b *et seq.*), public education (42 U.S.C. 2000c *et seq.*), federally assisted programs (42 U.S.C. 2000d *et seq.*), public employment (42 U.S.C. 2000e *et seq.*), and housing (42 U.S.C. 3601 *et seq.*). The private suit is an essential means of obtaining judicial enforcement of civil rights statutes. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45; *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 209. Such suits will be encouraged if private plaintiffs suing state officials pursuant to 42 U.S.C. 1983 may be awarded attorney's fees as provided in the Civil Rights Attorney's Fees Awards Act. Accordingly, the United States has a substantial interest in the proper interpretation of that Act.

STATEMENT

This class action under 42 U.S.C. 1983 challenges as unconstitutional the conditions of confinement for inmates of penal institutions administered by the Arkansas State Department of Correction. Respondents are inmates confined in these institutions; peti-

tioners include the Correction Commissioner, the members of the Arkansas State Board of Correction, and the Superintendents of the Cummins Unit of the Department and the Tucker Intermediate Reformatory (Pet. App. 17).

The district court here held the Arkansas prison system unconstitutional in certain respects.[1] The court ruled, *inter alia,* that the conditions of confinement for inmates placed in indefinite punitive isolation constituted cruel and unusual punishment. The court ordered the upgrading of the conditions of those placed in punitive isolation and prohibited respondents from confining any inmate in punitive isolation for more than 30 days. The court awarded respondents certain litigation costs, including an attorney's fee of $20,000, to be paid from funds allocated to the Department of Correction. 410 F. Supp. 251 (Pet. App. 6–92).

On appeal, petitioners challenged the district court's rulings limiting the duration of sentences to punitive isolation and awarding respondents attorney's fees. The court of appeals affirmed, and awarded respondents an additional $2,500 in attorney's fees for services on the appeal. 548 F. 2d 740 (Pet. App. 1–6).

[1] It acted pursuant to the court of appeals' remand in *Finney* v. *Arkansas Board of Correction*, 505 F. 2d 194 (C.A. 8), affirming in part and reversing in part *Holt* v. *Hutto*, 363 F. Supp. 194 (E.D. Ark.). The earlier procedural history of this protracted litigation may be found in *Holt* v. *Sarver*, 300 F. Supp. 825 (E.D. Ark.), and *Holt* v. *Sarver*, 309 F. Supp. 362 (E.D. Ark.), affirmed, 442 F. 2d 304 (C.A. 8).

Petitioners here contest both the 30-day limitation on the use of indefinite punitive isolation and the attorney's fees awards.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the "American Rule," litigants ordinarily pay their own attorney's fees in the absence of statutory or contractual provisions to the contrary. Acting pursuant to their inherent equitable powers, federal courts have recognized several exceptions to this rule. The "bad faith" exception allows a court to shift attorney's fees to a party found to have commenced an action or asserted a defense in bad faith, vexatiously, wantonly, or for oppressive reasons. *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 129; *Vaughn* v. *Atkinson,* 369 U.S. 527, 530–531. And under the "common benefit" exception, the cost of litigation is spread

[2] We have not had access to the record in this case in sufficient time to address the punitive isolation issue. On December 5, 1977, this Court granted petitioners' motion to dispense with the printing of an appendix. The record was not filed with the Court until December 12, 1977. In addition, we have been advised by counsel for respondents that testimony pertinent to the punitive isolation issue has not been transcribed. See Pet. App. 90 n. 14. If the entire record pertinent to this issue becomes available sufficiently in advance of oral argument, the United States may wish to file a supplemental brief that addresses this question. At this time, we take no position on the question whether the district court exceeded its remedial powers in placing a 30-day limit on the use of punitive isolation. We believe, however, that petitioners' separate challenges to the attorney's fees award—which present essentially legal questions—may be considered without the benefit of a review of the complete record. Accordingly, this brief will address those questions.

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among those who benefit from the lawsuit. *Hall* v. *Cole*, 412 U.S. 1, 5 n.7; *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 393–394. Under a third exception—the "private attorney general" doctrine—federal courts had awarded attorney's fees to plaintiffs who were successful in suits to enforce the provisions of federal statutes. See, *e.g.*, *Souza* v. *Travisono*, 512 F. 2d 1137 (C.A. 1), vacated, 423 U.S. 809; *Cornist* v. *Richland Parish School Board*, 495 F. 2d 189 (C.A. 5); *Taylor* v. *Perini*, 503 F. 2d 899 (C.A 6), vacated, 421 US. 982; *Donohue* v. *Staunton*, 471 F. 2d 475 (C.A. 7), certiorari denied, 410 U.S. 955; *Fowler* v. *Schwarzwalder*, 498 F. 2d 143 (C.A. 8); *Brandenburger* v. *Thompson*, 494 F. 2d 885 (C.A. 9). The attorney's fees awards in such cases were made primarily on the theory that the bringing of the litigation had implemented a public policy embodied in the substantive statute at issue, and that, accordingly, the plaintiff had performed a public service in the capacity of a "private attorney general."

In *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, the Court rejected the private attorney general exception to the American Rule, in the absence of statutory authorization. The Court reversed an award of attorney's fees to organizations that had instituted litigation to prevent issuance of permits by the Secretary of the Interior which were required for the construction of the trans-Alaska oil pipeline. Although the Court endorsed the "bad faith" and "common benefit" doctrines, 421 U.S. at 258–259,

it ruled that the courts' equitable powers would not support an award of attorney's fees to facilitate private enforcement of federal statutory rights. The Court stated that (421 U.S. at 269):

> [s]ince the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorney's fees beyond the limits of 28 U.S.C. § 1923 [permitting the taxing as costs of attorney's and proctor's docket fees and certain printing costs], those courts are not free to fashion drastic new rules with respect to the allowance of attorney's fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases.

Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94–559, 90 Stat. 2641, in response to this Court's decision in *Alyeska*.[2] The Act permits a federal court, in its discretion, to award reasonable attorney's fees to prevailing parties in suits to enforce the provisions of a number of civil rights statutes, including R. S. 1979 (42 U.S.C. 1983),

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[2] The Senate Judiciary Committee stated that the purpose of the bill was to "remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska* * * *." S. Rep. No. 94–1011, 94th Cong., 2d Sess. 1, 4 (1976). Accord, 121 Cong. Rec. S14975 (daily ed., August 1, 1975) (remarks of Senator Tunney).

pursuant to which this action was brought.' The Senate Report explains (S. Rep. No. 94–1011, *supra*, at 2) that the Act:

> is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866. * * * All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
>
> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

The court of appeals correctly ruled that the Act authorized the award of attorney's fees in this case, to be paid from the funds of a state agency. The Act specifically authorizes an award in cases—such as this one—brought under 42 U.S.C. 1983. Defendants in cases brought under Section 1983 typically are state officials acting under color of state law, whose legal defense ordinarily is provided by the State. Congress not only intended the Act to authorize the award of

[1] See, generally, *The Civil Rights Attorneys' Fees Awards Act of 1976*, 34 Wash. L. L. Rev. 205–223 (1977).

attorney's fees in such cases, but also specifically anticipated that such awards would normally be paid from state funds. Since the Act is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment, it abrogates any Eleventh Amendment immunity that the State might otherwise have enjoyed. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445. And, in any event, under *Edelman* v. *Jordan*, 415 U.S. 651, 668 the attorney's fees award has only an "ancillary effect" on the state treasury, and therefore under the rationale of *Ex parte Young*, 209 U.S. 123, falls outside the prohibitions of the Eleventh Amendment. Moreover, for the reasons discussed in the brief for the United States as *amicus curiae* in *Zurcher* v. *The Stanford Daily*, No. 76–1484, and *Bergna* v. *The Stanford Daily*, No. 76–1600, the fact that this action was commenced before the passage of the Act does not defeat the award in this case.

ARGUMENT

THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 AUTHORIZES AN AWARD OF ATTORNEY'S FEES IN THIS CASE

The court of appeals correctly ruled that the Civil Rights Attorney's Fees Awards Act of 1976 authorized an award of attorneys' fees in favor of the respondents (Pet. App. 4–5).[1] The Act specifically authorizes an award of attorney's fees to "the prevailing party" in cases such as this brought under 42

[1] The district court awarded attorney's fees to respondents on the theory that the instant case is "markedly different in quality from *Alyeska* and also that it falls within the 'bad faith' exception to the American Rule recognized in *Alyeska*" (Pet. App. 86). Since

U.S.C. 1983.[6] Neither the fact that the fees are to be paid out of state funds nor the fact that they cover work performed in part before the passage of the Act affects the propriety of the award.

A. THE ELEVENTH AMENDMENT DOES NOT BAR AN AWARD OF ATTORNEY'S FEES TO BE PAID FROM STATE FUNDS PURSUANT TO THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT

1. As a Valid Exercise of Congressional Power Pursuant to Section Five of The Fourteenth Amendment, The Act Abrogates Any Eleventh Amendment Immunity The State Might Otherwise Have Enjoyed

In *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, the Court held that the Eleventh Amendment did not prohibit the award of attorney's fees to "be paid out of the state treasury" (*id.* at 451) to plaintiffs who were successful in an employment discrimination suit brought against state officials pursuant to Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended,

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the Civil Rights Attorney's Fees Awards Act of 1976 was enacted while the case was pending on appeal, the court of appeals found it unnecessary to pass on the bad faith justification for the award although it noted that "the record fully supports the finding of the district court" on that question (Pet. App. 5). The existence of the Act similarly makes it unnecessary for this Court to consider whether the award of attorney's fees was justified by petitioners' conduct (see *infra*, p. 21).

[6] Respondents are "the prevailing party" within the meaning of the Act. They have prevailed on most of the issues that were resolved during the period covered by the award, including issues that are not being contested in this Court. An award of counsel fees is appropriate under the Act even when the prevailing party "ultimately does not prevail on all issues." S. Rep. No. 94–1011, *Supra*, at 5; 34 Wash. L. L. Rev. at 218–219.

42 U.S.C. (and Supp. V) 2000e *et seq.*[7] As amended in 1972, Title VII specifically authorizes the award of backpay and attorney's fees in suits against state and local governments. This Court reasoned that the Eleventh Amendment and the principle of state sovereignty it embodies[8] are limited by the provisions of Section 5 of the Fourteenth Amendment, and that Congress, in authorizing backpay and attorney's fees awards against the states under Title VII, was acting pursuant to its Fourteenth Amendment enforcement authority.

The rationale of *Fitzpatrick* v. *Bitzer* is fully applicable here. Like Title VII, the Civil Rights Attorney's Fees Awards Act was enacted pursuant to

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[7] The Court distinguished *Edelman* v. *Jordan*, 415 U.S. 651, in which the Eleventh Amendment was held to bar a private federal action for retroactive damages for the wrongful denial of welfare benefits, on the ground that the statutes involved in *Edelman* did not show any congressional intent to deprive the states of their Eleventh Amendment immunity, and thus "were incapable of supporting the predicate for a claim of waiver on the part of the State." *Fitzpatrick* v. *Bitzer*, *supra*, 427 U.S. at 452. This Court found a similar absence of congressional intention to limit state immunities in *Employees* v. *Missouri Public Health Dep't.*, 411 U.S. 279, upon which petitioners rely. In contrast, here, as in *Fitzpatrick* v. *Bitzer*, the congressional intent to limit that immunity is clear.

[8] Although the Amendment, quoted *supra* at p. 2, explicitly prohibits only suits against states in federal court brought by citizens of other states or by citizens or subjects of any foreign state, this Court has interpreted it as preserving the state's sovereign immunity, and thus precluding also unconsented actions brought by a citizen of the state being sued. *Edelman* v. *Jordan*, *supra; Employees* v. *Missouri Public Health Dept.*, *supra; Parden* v. *Terminal R. Co.*, 377 U.S. 184; *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47; *Hans* v. *Louisiana*, 134 U.S. 1.

Congress' powers under Section 5 of the Fourteenth Amendment (as well as its similar power to enforce the Thirteenth Amendment). See, *e.g.*, S. Rep. No. 94–1011, *supra*, at 5. Like the backpay and attorney's fees provisions of Title VII, then, the Attorney's Fees Awards Act limits the Eleventh Amendment principle of state sovereignty.[9]

That Congress intended to subject states and their agencies to the payment of attorney's fees in cases against their officials is clear from the legislative history of the Act. The Senate repeatedly tabled amendments that would have exempted state and local governments from the Act's requirements. 122 Cong. Rec. S16431–S16434 (daily ed., September 22, 1976); 122 Cong. Rec. S16567 (daily ed., September 24, 1976); 122 Cong. Rec. S16656, S16657 (daily ed., September 27, 1976). The Senate Report accompanying the Act provides (S. Rep. No. 94–1011, *supra*, at 5).

> As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972,

[9] The lower federal courts have generally agreed that the Act abrogates the states' Eleventh Amendment immunity. See *Gates* v. *Collier*, 559 F. 2d 241 (C.A. 5); *Bond* v. *Stanton*, 555 F. 2d 172 (C.A. 1); *Rainey* v. *Jackson State College*, 551 F. 2d 672 (C.A. 5); *La Raza Unida of Southern Alameda County* v. *Vople*, N.D. Cal., No. C–71–1166 RPF, decided September 29, 1977; *Southeast Legal Defense Group* v. *Adams*, 436 F. Supp. 891, 893–894 (D. Ore.); *Guajardo* v. *Estelle*, 432 F. Supp. 1373 (S.D. Tex.); *Gary W.* v. *State of Louisiana*, 429 F. Supp. 711 (E.D. La.); *Wade* v. *Mississippi Co-Op Extension Service*, 424 F. Supp. 1242 (N.D. Miss.). But see *Skehan* v. *Board of Trustees of Bloomsburg State College*, 436 F. Supp. 657, 666–667 (M.D. Pa.); *Shannon* v. *United States Department of Housing and Urban Development*, 433 F. Supp. 249 (E.D. Pa.).

> defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorney's fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party) [footnotes omitted].

The pertinent House Report, H.R. Rep. No. 94–1558, 94th Cong., 2d Sess. 7 (1976), provides that:

> [G]overnment officials are frequently the defendants in cases brought under the statutes covered by H.R. 15460. See, *e.g.*, *Brown* v. *Board of Education*, [347 U.S. 483]; *Gautreaux* v. *Hills*, [sic] [425 U.S. 284]; *O'Connor* v. *Donaldson*, [422 U.S. 563]. Such governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves. * * * The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities [footnote omitted].

And Representative Drinan described the relationship between the Act and the Eleventh Amendment as follows (122 Cong. Rec. H12160 (daily ed., October 1, 1976)):

> The question has been raised whether allowing fees against State governments in suits properly brought under the covered statutes would violate the 11th amendment. That amend-

> ment limits the power of the Federal courts to entertain actions against a State. This issue is no longer seriously in dispute after the recent Supreme Court decision in Fitzpatrick against Bitzer. Since this bill is enacted pursuant to the power of Congress under section 2 of the 13th amendment and section 5 of the 14th amendment, any question arising under the 11th amendment is resolved in favor of awarding fees against State defendants.

See also H.R. Rep. No. 94–1558, *supra,* at 7 n. 14.

Petitioners accurately note (Br. 8) that Congress did not provide for the naming of States and their agencies as defendants in cases brought under 42 U.S.C. 1983.[10] But that does not preclude the award of attorney's fees to be paid from state funds in cases successfully brought against state officials under that statute. That is the result Congress specifically intended in the legislative history quoted above.

In doing so, Congress correctly recognized that there is no requirement that a state must be a named defendant for the court to issue an order requiring the expenditure of state funds. In *Fitzpatrick* v. *Bitzer, supra,* on which Congress relied, this Court

[10] 42 U.S.C. 1983, quoted *supra* at pp. 2–3, authorizes only suits against "persons" acting under color of law. States and their agencies are not "persons" within the meaning of Section 1983. Cf. *Fitzpatrick* v. *Bitzer*, *supra*, 427 U.S. at 452; *Monroe* v. *Pape*, 365 U.S. 167, 187–191. In contrast, the Attorney's Fees Awards Act does not refer to "persons"—it simply provides that the court may award the "prevailing party" a reasonable attorney's fee as part of the costs. That is precisely what was done here.

upheld an award of backpay and attorney's fees to be paid from state funds, although neither the state nor any state agency was a named defendant. See *United States* v. *Donaldson,* 429 U.S. 413, 448 n. 4, 451.[11] States commonly bear the costs of litigation in suits against state officials in their official capacities.[12] Moreover, since the state confers upon its officers the authority to act on its behalf, it is entirely appropriate to require the state to pay attorney's fees in civil rights suits challenging those actions, regardless of whether the state or any of its agencies has been named as a defendant.

2. An Award Of Attorney's Fees Has Only An Ancillary Effect On The State Treasury

Wholly apart from the fact that Congress was exercising its Thirteenth and Fourteenth Amendment enforcement powers against the states when it enacted the Attorney's Fees Awards Act, the payment of counsel fees has in any event only an "ancillary effect" on the state treasury under the rationale of *Edelman* v. *Jordan,* 415 U.S. 651, and therefore does not abrogate the state's sovereign immunity preserved by the Eleventh Amendment.

[11] This Court's decisions in *Graham* v. *Richardson*, 403 U.S. 365, 367, 369, and *Goldberg* v. *Kelly*, 397 U.S. 254, 261, also resulted in increased state expenditures for welfare programs, even though the named defendants were state and local officials, not the states or any of their agencies.

[12] See, *e.g.*, Ark. Stats., 1947 § 12–712 (1968 Repl.) (directing the Attorney General to represent "all state officers * * * in all litigation where the interests of the state are involved"); Ann. Cal. Gov. Code § 825 *et seq.* (West Cum. Supp. 1977).

Under the long-standing doctrine of *Ex parte Young,* 209 U.S. 123, equitable relief may be secured against the enforcement of an unconstitutional state statute notwithstanding any incidental drain on the state treasury resulting from the cost of compliance with the court's mandate. *Edelman* v. *Jordan, supra,* 415 U.S. at 668. This Court has also held that litigation costs may be taxed against the states. *Fairmont Creamery Co.* v. *Minnesota,* 275 U.S. 70. We submit that attorney's fees are an incidental cost of securing compliance with federal laws analogous to other litigation costs. They are not, as petitioners contend, the equivalent of money damages designed to redress or punish past misconduct, and thus within the purview of the Eleventh Amendment.

The Court in *Edelman* v. *Jordan, supra,* while acknowledging that "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night" (415 U.S. at 667), nonetheless provided considerable guidance for distinguishing the two by describing the salient characteristics of each. The sort of relief that is barred is "a liability which must be paid from public funds" (*id.* at 663); "an accrued monetary liability which must be met from the general revenues" (*id.* at 664); "payment of a very substantial amount of money which * * * should have been paid, but was not" (*ibid.*); "'use [of] state funds to make reparation for the past'" (*id.* at 665); "retroactive payments" (*id.* at 666 n. 11); and "payment of state

funds * * * as a form of compensation" (*id.* at 668). These characteristics lead to the general conclusion that money relief is barred when "it is in practical effect indistinguishable in many aspects from an award of damages against the State" (*ibid.*).

An award of attorney's fees does not share these characteristics. It is not akin to damages: it is intended neither to compensate the victims of, nor to punish the state for, past illegal conduct.

Rather, the award of counsel's fees is much closer to the sort of draw upon the state treasury, permitted by *Ex parte Young* and *Edelman* v. *Jordan,* that comes about as the "necessary consequence of compliance in the future with a substantive federal-question determination" (415 U.S. at 668; see also *id.* at 665). While the payment of attorney's fees is not identical to the increased funding of state programs required as a practical matter as a result of this Court's decisions in *Graham* v. *Richardson,* 403 U.S. 365, and *Goldberg* v. *Kelly,* 397 U.S. 254 (see 415 U.S. at 667–668), the differences militate in favor of the inclusion of attorney's fees among the genre of awards allowable. As the Court stated in *Edelman* v. *Jordan,* "the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature" (415 U.S. at 667–668). The prospect of an award of counsel fees is in many cases a necessary prerequisite to the bringing of the suit itself. If the Eleventh Amendment does not protect the states from having "to spend money from the state treasury" "in order to shape

[its] conduct to the mandate of the Court's decrees" (415 U.S. at 668), then surely it should not be the basis for defeating such suits in the first place, which would be the likely result of a rule barring awards of attorney's fees against the states. Like the other costs of the litigation, the fee award is merely part of the cost of bringing the state into future compliance by means of the litigation itself. In short, such an award, like the fiscal consequence to the state resulting from the need to comply with a judicial decree, has only "an ancillary effect on the state treasury [which] is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*" (*ibid.*).[13]

[13] Although the circuits are split on the issue, most agree that an award of attorney's fees to be paid by the state is not barred by the Eleventh Amendment. See, *e.g.*, *Souza* v. *Travisono*, 512 F. 2d 1137 (C.A. 1), vacated, 423 U.S. 809; *Class* v. *Norton*, 505 F. 2d 123, 125 (C.A. 2); *Jordan* v. *Fusari*, 496 F. 2d 646, 651 (C.A. 2); *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala.) affirmed, 409 U.S. 942. The Seventh Circuit follows the same rule, finding *Sims* v. *Amos*, *supra*, controlling, *Bond* v. *Stanton*, 528 F. 2d 688, vacated and remanded for further consideration in light of Pub. L. 94–559, 429 U.S. 973, as does the Ninth, *Brandenburger* v. *Thompson*, 494 F. 2d 885. See also *Thonen* v. *Jenkins*, 517 F. 2d 3 (C.A. 4); *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, 504 F. 2d 1017 (C.A. 1), certiorari denied, 421 U.S. 910.

The Sixth Circuit has held that a state's immunity bars an award of attorney's fees, *Jordon* v. *Gilligan*, 500 F. 2d 701, certiorari denied, 421 U.S. 991, relying on *Skehan* v. *Board of Trustees of Bloomsburg State College*, 501 F. 2d 31 (C.A. 3), vacated and remanded for further consideration in light of *Alyeska Pipeline Service Co.* v. *Wilderness Society*, *supra*, and *Wood* v. *Strickland*, 420 U.S. 308, 421 U.S. 983. A subsequent Sixth Circuit decision to like effect, *Taylor* v. *Perini*, 503 F. 2d 899, was vacated and remanded for further consideration in light of *Alyeska Pipeline Service Co.* v. *Wilderness Society*, *supra*, 421 U.S. 982. See, also,

As Mr. Justice Stevens noted in his concurrence in *Fitzpatrick* v. *Bitzer* (427 U.S. at 460), this result in essence merely restates the doctrine of *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70, where the state attempted to assert its sovereignty as a bar to an award of costs against it. This Court held that it was justified "in treating the state just as any other litigant and in imposing costs upon it as such" (*id.* at 77) since the case was brought to the Court not "by the state's consent but by virtue of a law, to which it is subject. Though a sovereign, in many respects, the state when a party to litigation in this Court loses some of its character as such" (275 U.S. at 74). It should be no different in any federal court. "[T]o the extent states and state officials are, under our federal system, amenable to suit in federal courts, they should be responsible for costs and fees incidental to litigation to the same degree as others" (*Souza* v. *Travisono*, 512 F. 2d 1137, 1140 (C.A. 1), vacated, 423 U.S. 809).[14]

Named Individual Members of San Antonio Conservation Society v. *Texas Highway Dist.*, 496 F. 2d 1017 (C.A. 5). See, generally, Note, *Attorneys' Fees and the Eleventh Amendment*, 88 Harv. L. Rev. 1875 (1975).

[14] The State of California, in its brief *amicus curiae* (p. 6), states that *Sprague* v. *Ticonic Bank*, 307 U.S. 161, establishes that an award of attorney's fees is "quite unlike" an award of taxable costs. But that case simply held that attorney's fees and taxable costs were sufficiently distinct so that a claim for the latter did not constitute a waiver of reimbursement for the former (*id.* at 168). Nothing in *Sprague* is inconsistent with our contention that at least where, as here, the underlying statute provides for an award of attorney's fees, there is no analytical difference between costs and attorney's fees for purposes of considering whether they are allowed by *Ex parte Young* or barred by the Eleventh Amend-

This Court has already affirmed a decision reaching this result, *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala.), summarily affirmed, 409 U.S. 942.[15] There the district court taxed attorney's fees against the state, ruling that a state was without immunity in suits brought under the doctrine of *Ex parte Young*. In its Jurisdictional Statement the state protested the award as an unlawful abrogation of its sovereign immunity, and this Court's affirmance apparently rejected that

ment. See *Souza* v. *Travisono*, *supra*, 512 F. 2d at 1140; *Class* v. *Norton*, *supra*, 505 F. 2d at 125; *Taylor* v. *Perini*, *supra*, 503 F. 2d at 909 (Edwards, J., dissenting). Indeed, the applicable statutory provision here, the Attorney's Fees Awards Act, provides for an award of attorney's fees "as part of the costs."

[15] Petitioners incorrectly suggest (Br. 17) that *Sims* v. *Amos* is undercut by this Court's summary affirmance, 421 U.S. 972, of the denial of attorney's fees in *Murgia* v. *Mass. Bd. of Retirement*, 386 F. Supp. 179 (D. Mass.). In *Murgia*, a state police officer challenged as unconstitutional a statute that required his retirement solely because he had reached age 50. A three-judge court held the statute unconstitutional (376 F. Supp. 753), but refused to award counsel fees in the absence of a statute permitting the award, both because of the Eleventh Amendment "and as a matter of discretion" (386 F. Supp. at 182). This Court's summary affirmance of that refusal is not a significant precedent on the question whether an award of counsel fees to be paid by a state agency is barred by the Eleventh Amendment, since the Court may have concluded that the case did not come within any of the exceptions to the "American Rule" permitting the awarding of counsel fees without specific statutory authorization or that, even if it did, it was within the trial court's discretion to decline to make such an award. (This Court subsequently reversed the district court's judgment on the merits, 427 U.S. 307.)

claim on the merits. Cf. *Hicks* v. *Miranda*, 422 U.S. 332, 344–345.[16]

B. THE ACT APPLIES TO CASES SUCH AS THIS, PENDING ON THE DATE OF ENACTMENT

This case was instituted in April 1969; the award of counsel fees at issue here was for legal services rendered after the court of appeals' remand in November 1974 (Pet. App. 14).[17] The fact that a substantial part of the services were completed before the Act's passage does not affect the validity of the award. We have discussed in our brief amicus in *Zurcher* v. *Stanford Daily*, and *Bergna* v. *Stanford Daily*, Nos. 76–1484 and 76–1600, the reasons why we believe the Act authorizes payment for services rendered before it was enacted, under the principles of *Bradley* v. *Richmond School Board*, 416 U.S. 696.[18]

[16] The Seventh Circuit so held in *Bond* v. *Stanton*, supra, note 13. *Brandenburger* v. *Thompson*, *supra*, 494 F. 2d at 888, also relied on this Court's affirmance in *Sims* v. *Amos* in holding attorney's fees allowable. See also *Taylor* v. *Perini*, *supra*, 503 F. 2d at 907–908 (Edwards, J., dissenting) (affirmance in *Sims* binding); *Newman* v. *State of Alabama*, 522 F. 2d 71, 72–80 (C.A. 5) (Gewin, Brown, Wisdom, Thornberry, Goldberg, JJ., dissenting from remand for reconsideration of attorney's fees issue) (semble). Contra, *Skehan* v. *Board of Trustees of Bloomsburg State College*, *supra*, 501 F. 2d at 42 n. 7; *Jordan* v. *Gilligan*, *supra*, 500 F. 2d at 706–709; *Taylor* v. *Perini*, *supra*, 503 F. 2d at 905 (by implication).

[17] In 1973, the district court allowed respondent's then counsel an $8,000 fee, which was paid by the Department of Correction (Pet. App. 82).

[18] We are sending the parties to this litigation a copy of our amicus brief in *Stanford Daily*.

CONCLUSION

The award of attorney's fees should be affirmed.
Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
DREW S. DAYS, III,
Assistant Attorney General.
WALTER W. BARNETT,
DENNIS J. DIMSEY,
Attorneys.

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